U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: JUN 1 3 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tax consulting and bookkeeping business. It seeks to permanently employ the beneficiary in the United States as a management analyst. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 19, 2007 and May 26, 2010 decisions, the issue in this case is whether the petitioner has established his ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on February 8, 2007. The proffered wage as stated on the ETA Form 9089 is $31.20 per hour ($64,896.00 per year). The ETA Form 9089 states that the position requires a bachelor's degree in business administration, accounting, or a related field and five years of experience in the job offered or five years of experience in a related occupation, accountant or business analyst.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to currently employ six workers. On the ETA Form 9089 the beneficiary claims to have been employed by the petitioner since November 30, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The petitioner submitted a copy of a pay stubs issued to the beneficiary as of December 31, 2006 and as of June 2010. The petitioner also submitted on appeal a copy of IRS Forms W-2 allegedly issued by the petitioner to the beneficiary in 2007 and 2008 as shown below:

- In 2007, the Form W-2 stated total wages of $39,144.08 (a deficiency of $25,751.92).
- In 2008, the Form W-2 stated total wages of $39,837.83 (a deficiency of $25,058.17).
- In 2009, the Form W-2 stated total wages of $38,584.92 (a deficiency of $26,311.08).
- In 2010, the pay stubs issued to beneficiary in June stated year-to-date wages of $18,510.30.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C (or, if a farm, Schedule F) and are carried forward to the first page of the tax return. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 37. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) as follows:

- In 2007, the proprietor's IRS Form 1040 stated AGI of $131,484.00.
- In 2008, the proprietor's IRS Form 1040 stated AGI of $168,664.00.
- In 2009, the proprietor's IRS Form 1040 stated AGI of $105,858.00.
- In 2010, the petitioner did not provide a Form 1040.

Where the petitioner's AGI amounts exceeded the proffered wage amounts, the sole proprietor must show that he can sustain himself and his dependents by listing his personal household expenses. *See Ubeda v. Palmer, supra.*

With respect to the sole proprietor's household expenses (HHE), the petitioner listed his annual household expenses as follows:

- In 2007, the sole proprietor's [redacted] were $43,851.00 (a surplus of $61,881.08).
- In 2008, the sole proprietor's [redacted] were $77,458.00 (a surplus of $66,147.83).
- In 2009, the sole proprietor's [redacted] were $52,654.00 (a surplus of $26,892.92).
- In 2010, the sole proprietor's [redacted] were $58,733.60.

Although the sole proprietor's adjusted gross income minus his disclosed annual household expenses was sufficient to cover the proffered wage in 2007, 2008, and 2009, it does not appear that he could support himself and his dependents on the amounts that remained after paying the beneficiary's wages. The sole proprietor filed his tax return as married filing jointly and lists two children as dependents on his income tax returns. However, he fails to consistently list education expenses, automobile insurance expense, or credit card expenses for the relevant years. It also appears that the statements of household expenses were understated. For example, in 2009, the petitioner claims to have paid $1,200.00 in medical expenses, $7,200.00 in property tax, and $1,560.00 in state tax. However, on the petitioner's 2009 Schedule A, he listed substantially higher figures for these items. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). It is improbable that the sole proprietor could support himself and three dependents on the minimum amount of funds that would remain after reducing the adjusted gross income by the amount of his total household expenses. In addition, there is insufficient evidence in the record of proceeding to demonstrate the sole proprietor's ability to pay the proffered wage in 2010. Although the priority date in this matter is February 8, 2007, the AAO has taken into consideration the evidence submitted for 2006 (pay stubs and Form 1040), which when reviewed is insufficient to demonstrate the petitioner's ability to pay the proffered wage. It is noted that the sole proprietor did not submit a list of household expenses for 2006.

Finally, although the adjusted gross income amount exceeds the proffered wage amount for 2007, 2008, and 2009, and the record shows that there is a surplus left over after the sole proprietor's household expenses are subtracted in those years (assuming the accuracy of these expenses, which is in doubt), USCIS electronic records indicate that the petitioner has filed additional immigrant and non-immigrant petitions which have been pending simultaneously. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that he requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that he has the ability to pay the wages of all of the individuals he is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that he has the ability to pay combined salaries of the beneficiaries. Therefore, the petitioner has failed to establish his ability to pay the proffered wage since the priority date.

Counsel infers that the balances (cash on hand) in the sole proprietor's business accounts are sufficient to demonstrate his ability to pay the proffered wage. The petitioner provided a copy of his business checking account statements for 2007. The petitioner's reliance on the balances in the business bank account is misplaced. First, business checking account bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the sole proprietor in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, no evidence was submitted to demonstrate that the funds reported on the business checking account bank statements somehow reflect additional available funds that were not reflected on these tax returns. These funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses.

Counsel asserts that the beneficiary, as an employee, will play a major role in the growth of the petitioner's business. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a management analyst has and will significantly increase the sole proprietor's profits or cause the business to grow. This hypothesis cannot be concluded to outweigh the evidence presented in the petitioner's Form 1040 tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding

reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses during the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. Counsel asserts on appeal that the petitioner has been in business since 1985 and that he anticipates a steady increase in his income. Reliance on the petitioner's future receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. The petitioner has not shown through professionally prepared audited financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Regardless, future projections of increased income are insufficient to demonstrate the petitioner's ability to pay the proffered wage beginning in 2007. Finally, the record contains unresolved inconsistencies pertaining to the petitioner's claimed annual household expenses and his failure to account for the simultaneously pending immigrant and nonimmigrant petitions. Overall, the record is not persuasive in establishing that the job offer was realistic in the relevant years.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.